

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES MICHAEL DOCHOW
Claimant

VS.

DESIGN CENTRE INTERIORS, INC.
Respondent

AND

EMPLOYERS MUTUAL CASUALTY CO.
Insurance Carrier

Docket No. 1,025,960

ORDER

Claimant requested review of the February 16, 2006, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant did not establish that his symptoms in his left upper extremity were causally related to his work for respondent, that his left upper extremity was injured as a result of overcompensation, or that his left upper extremity was injured as the natural and probable consequence of the original injury. The ALJ acknowledged that claimant is currently receiving authorized medical care for his right upper extremity condition and is receiving temporary total disability benefits. The ALJ ordered respondent to continue temporary total disability benefits to claimant if he is taken off work by the authorized physician.

Claimant argues that his symptoms in his left upper extremity are the result of overcompensation and the direct result of his initial injury to his right upper extremity. Claimant asserts that he has not worked since he left his employment with respondent in November 2004, and there is no evidence of an intervening event or injury. He claims that the evidence is uncontroverted that his increased use of his left arm in 2005 produced greater symptoms while he compensated for the initial injury.

Respondent and its insurance carrier (respondent) argue that claimant's right upper extremity injury did not result in overcompensation and injury to claimant's left upper

extremity. Respondent notes there is no testimony from a physician linking claimant's left upper extremity complaints with his injury to his right upper extremity. Respondent also asserts that claimant never definitively stated that his left arm was worse because of overuse nor that his left arm pain was related to his right arm condition. Accordingly, respondent requests that the ALJ's Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant testified that he previously worked for respondent as an installation supervisor nine or ten months out of the year. He described his job as hauling displays to air shows, baseball games, football games, and boat races, and then setting up displays. This would include lifting plasma screen televisions and audio-visual equipment. During the months he was not working for respondent, claimant worked as a stage hand for Stagecraft, Incorporated.

Claimant testified that he had been having ongoing numbness in his hands and pain in his right wrist and elbow for several months while working for respondent. On November 5, 2004, he was lifting a plasma screen television and experienced what he described as "unbearable" pain.¹ He reported problems with his right elbow and wrist to his supervisor on November 7, 2004, which was his last day of work. Respondent sent him to see a doctor, who suspected mild to moderate carpal tunnel syndrome and ordered a nerve conduction study (NCS). The NCS of the right upper extremity was performed on November 23, 2004, and confirmed that claimant had mild right carpal tunnel syndrome. Respondent accepted the claim as compensable. Claimant moved from Kansas to California, and respondent authorized treatment with Dr. Andre M.V. Chaves.

Claimant testified that at his first appointment with Dr. Chaves, on January 11, 2005, Dr. Chaves asked about his left arm, and he reported that his left arm tingled and was falling asleep but did not hurt. There is no mention of claimant's left upper extremity in Dr. Chaves' report of that first visit. Dr. Chaves continued to treat claimant's right upper extremity, performing a right carpal tunnel release on April 26, 2005, and a right cubital tunnel release with medial epicondylectomy on August 16, 2005. Claimant has been receiving temporary total disability compensation since April 26, 2005. Before that date, he was receiving unemployment benefits.

Claimant stated that during 2005, his left arm got progressively worse. When asked if certain activities caused his left hand and arm to get worse, he stated: "Probably the fact

¹Dochow Depo. at 12.

that I didn't use much of my right hand from last year."² Dr. Chaves' records first mention claimant's problems with his left upper extremity on October 18, 2005. Dr. Chaves recommends a NCS of claimant's right and left upper extremities, and claimant is requesting that this testing and future treatment be authorized.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

Here, claimant relates his left upper extremity symptoms to his overuse of that extremity due to the injury and surgeries to his right upper extremity. That is, he uses his left arm more to protect his injured right arm. There is no contrary evidence. The Board acknowledges that there is no expert medical testimony on the cause of claimant's left upper extremity symptoms, but claimant's testimony alone is sufficient evidence to establish his own physical condition and the existence, nature, and extent of the injury.⁵ The finder of fact cannot disregard undisputed evidence which is not improbable, unreasonable, or shown to be untrustworthy. Such evidence should be regarded as conclusive.⁶

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,⁷ the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

²*Id.* at 15.

³K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁴K.S.A. 2005 Supp. 44-508(g).

⁵*Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999); *Hardman v. City of Iola*, 219 Kan. 840, 549 P.2d 1013 (1976); *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

⁶*Overstreet v. Mid-West Conveyor Co., Inc.*, 26 Kan. App. 2d 586, 589, 994 P.2d 639 (1999).

⁷*Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972); *see also Casco v. Armour Swift-Eckrich*, 34 Kan. App. 2d 670, Syl. ¶ 2, 128 P.3d 401 (2005).

Based on the record presented to date, the Board finds that claimant has met his burden of proving that his left upper extremity condition is a direct and natural consequence of his right upper extremity injury due to overuse from overcompensation. It is, therefore, compensable as a work-related injury.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 16, 2006, is reversed, and this matter is remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director